

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 13, 2010

STATE OF TENNESSEE v. JOANN BREWER

Appeal from the Circuit Court for Wayne County
No. 14127 Robert Holloway, Judge

No. M2009-00342-CCA-R3-CD - Filed March 16, 2010

The Defendant, Joann Brewer, was charged with and convicted of three counts of selling greater than .5 grams of methamphetamine, a Class B felony. See Tenn. Code Ann. § 39-17-417(c)(1). She was sentenced as a Range I, standard offender to twelve years for each conviction and ordered to serve one of her twelve year sentences consecutively to the other two, which were to be served concurrently with each other, for a total effective sentence of twenty-four years in the Department of Correction. In this direct appeal, the Defendant argues that the trial court erred: (1) in overruling her motion for a mistrial after the State made certain remarks during its closing argument; (2) in admitting a booking sheet not properly authenticated as a business record; and (3) in setting the length of her sentence and ordering her to serve consecutive sentences. After our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellant, Joann Brewer.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Mike Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Testimony at trial established that the Wayne County Sheriff's Department used a confidential informant ("CI") to purchase methamphetamine from the Defendant on three separate occasions: September 29, October 3, and October 12, 2006. Each purchase took place at the Defendant's house, with the CI handing the Defendant money in exchange for methamphetamine produced from the Defendant's purse. On the first two occasions, the CI paid \$150 for methamphetamine; on the third, he paid \$500. Forensic scientists from the Tennessee Bureau of Investigation tested and weighed the substances returned by the CI after each purchase, finding 1.5, 1.8, and 6.6 grams of methamphetamine, respectively.

Investigator Darrell Fisher introduced an intake form generated "when [the Defendant was] booked into jail and charged" at the Wayne County Jail. Investigator Fisher agreed that such forms are "regularly kept as part of the business activity of the Wayne County Jail." The form contains the Defendant's address and telephone number.

Anthony Hampton testified that he called the Defendant while incarcerated at the Maury County Jail some time after the Defendant had been arrested on the charges at issue in this case. The Defendant's intake form bolstered the credibility of this evidence, as Mr. Hampton was able to show that the conversation occurred between the jail phone number and the Defendant's phone number as recorded on the form. The State introduced and played a recording of the resulting conversation. Mr. Hampton identified the Defendant as the other person speaking in the conversation. The recording is not included in the record, but it apparently contains the Defendant speculating that the CI, who she mentions by name, "got" her.

The Defendant was convicted as charged. She now appeals.

Analysis

I. Introduction of Intake Form

The Defendant first contends that the trial court erred in admitting her Wayne County Jail booking sheet for the purpose of showing her phone number. The Defendant objected to the document's admission at trial because "it is hearsay and [has not] been properly authenticated as a business record," apparently under Tennessee Rule of Evidence 803(6), which excepts business records from the rule excluding hearsay. On appeal, however, the Defendant argues that the trial court erred in admitting the intake form because it was not properly authenticated under Tennessee Rule of Evidence 901(a), which states that the "requirement of authentication or identification as a condition precedent to admissibility is

satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.”

We need not decide either issue, because any error was harmless. Tennessee Rule of Appellate Procedure 36(b) states that “a final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.” The Defendant’s intake form simply tended to bolster the State’s argument that it was the Defendant who conversed with Mr. Hampton on the recorded phone call he made from the Maury County Jail; Mr. Hampton identified the Defendant as well, however. This issue is without merit.

II. Motion for a Mistrial

During closing argument, the State commented on Mr. Hampton’s phone conversation with the Defendant, stating that

during that same conversation they’re talking about how they’re going to handle their cases. [The Defendant is] clearly on the tape saying she’s going to run hers all the way to trial and make whoever it was get on there and say it and that she’d get the best deal, at least, that way. I mean, clearly, that was on the tape.

What she’s not saying, well, I didn’t do it, on this tape. She’s not saying that they’re telling a bunch of lies on me. She’s not saying anything like that. She is clearly affirming on that telephone conversation through Mr. Hampton . . . that, yeah, who got you probably got me, too.

The Defendant moved for a mistrial, arguing that the State had “made an inappropriate comment about her right to go to trial.” The trial court overruled the motion, explaining that it “didn’t take it as a criticism as going to trial. I took it more as a reflection of what the testimony was.”

In a criminal trial, a mistrial should only be declared “in the event of a ‘manifest necessity’ that requires such action.” State v. Reid, 164 S.W.3d 286, 341 (Tenn. 2005) (quoting State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998)). “The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict.” State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). An abstract formula should not be applied mechanically in determining whether a mistrial was necessary, and all relevant circumstances should be taken into account. State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993). Whether a mistrial should be granted is a

determination left to the sound discretion of the trial court. Reid, 164 S.W.3d at 342 (citing State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994)). The trial court's decision should not be overturned absent an abuse of discretion. Id. Additionally, the party arguing that a mistrial should have been granted bears the burden of establishing its necessity. Id. (citing Williams, 929 S.W.2d at 388).

We agree with the trial court, and conclude that the court did not abuse its discretion in declining to grant a mistrial. In our view, the State did not disparage the Defendant's plan to "run [her case] all the way to trial"; it referenced that statement in order to orient the jury and point out that the phone call did not contain any claim of innocence by the Defendant, and in fact did contain an agreement that the CI had "got" her. We see nothing in this argument that tended to preclude an impartial verdict. This issue is without merit.

III. Sentencing

Laurie Wade of the Board of Probation and Parole introduced and explained the Defendant's presentence report at her sentencing hearing. The presentence report indicates that, at the time of sentencing, the Defendant was a fifty-one-year-old white female with a residence in Florence, Alabama. Her prior criminal history included: in 2002, convictions for unlawful drug paraphernalia uses and activities, simple possession of drugs, and a Schedule II controlled substance felony conviction; in 2000, two convictions for driving on a suspended license, one probation violation, and one conviction for possession of less than .5 ounces of marijuana; and in 1999, thirty-three misdemeanor convictions for worthless checks.

Officer Chuck Hearn, a member of the Florence Police Department in Lauderdale County, Alabama, testified that the Defendant had charges pending against her in Alabama for possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, and illegal possession of a firearm.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances,

then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

A. Length of Sentence

The Defendant's conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. As further explained by our supreme court in Carter,

the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," [Tenn. Code Ann.] § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," [Tenn. Code Ann.] § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," [Tenn. Code Ann.] § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court's sentencing decision. Id. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. Id. at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. Id. Thus, the 2005 revision to

Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. Id. at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See id. at 343; State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is de novo. Carter, 254 S.W.3d at 345.

The trial court found as enhancement factors that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish her range and that she violated probation and thus failed to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(1), (8).

The Defendant makes no argument that the trial court erred in sentencing her to the maximum of twelve years on each count except to assert that her sentence “was excessive, inappropriate, and not in accordance with the Tennessee Criminal Sentencing Reform Act of 1989.” We disagree. Our review reveals that the trial court considered the sentencing principles and all relevant facts and circumstances, and correctly applied enhancement factors. Although the trial court referenced the charges “pending” in Alabama, the record reflects that the trial court relied on and gave great weight to the multiple prior criminal convictions in Tennessee. This issue is without merit.

B. Consecutive Sentences

The Defendant next contends that the trial court erred in ordering her to serve one of her sentences consecutively to the other two. Tennessee Code Annotated section 40-35-115(b) provides that a trial court may, in its discretion, order sentences to run consecutively if it finds any one of a number of criteria by a preponderance of the evidence. In this case, the trial court ordered consecutive sentences based on its findings that the Defendant “is a professional criminal who has knowingly devoted [her] life to criminal acts as a major source of livelihood” and that the Defendant “is an offender whose record of criminal activity is extensive.” See Tenn. Code Ann. § 40-35-115(b)(1), (2).

We consider it a close question whether the evidence supports the trial court’s finding that the Defendant’s criminal activity was a major source of livelihood, as her previous convictions did not involve the sale of controlled substances. The evidence certainly does support, however, the trial court’s finding that the Defendant has an extensive record of

criminal activity, given her previous felony and thirty-nine previous misdemeanors. Because consecutive sentencing is warranted when at least one of the statutory criteria exists, see State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995), the record supports the imposition of consecutive sentences. We conclude that the trial court did not abuse its discretion by ordering partial consecutive sentences. The Defendant is not entitled to relief on this issue.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

DAVID H. WELLES, JUDGE